Supreme Court, U.S.
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No. 99-991

IN THE

Supreme Court of the United States

October 1999 Term

B. J. GRIFFITH, GORDON GRIFFITH AND DELTA WASTE RECOVERY, INC. ..... *Petitioners*

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, EAST ARKANSAS PLANNING AND DEVELOPMENT DISTRICT AND EAST ARKANSAS REGIONAL SOLID WASTE MANAGEMENT DISTRICT .... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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27pp

QUESTION PRESENTED FOR REVIEW

May the State of Arkansas or one of its agencies be sued in federal court pursuant to 42 U.S.C.A. §1983 when a state statute, A.C.A. §21-9-301, states that officers of the state are not immune from suit if their actions are intentional. The action brought in federal court in this case states that the actions of the employees of the State of Arkansas were done intentionally, not negligently. Are employees and agencies of the State of Arkansas therefore immune from suit in federal court?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners, B. J. Griffith, Gordon Griffith and Delta Waste Recovery, Inc., state that they have no parent corporation or non-wholly owned subsidiaries.

PARTIES TO THE PROCEDING

Petitioners

B. J. Griffith, Gordon Griffith and Delta Waste Recovery, Inc.

Respondents

Arkansas Department of Pollution Control and Ecology; East Arkansas Planning and Development District; and East Arkansas Regional Solid Waste Management District.

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The petitioners alleged in their complaint a cause of action against the state based upon Ark. Code Ann. §21-9-301, which states officials and agencies are not immune if their actions are done intentionally against a citizen of the state

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was reported on August 10, 1999. It was unpublished. A copy of the opinion is included in the appendix at Appendix A.

The opinion of the District Court for the Eastern District of Arkansas, Eastern Division, was filed on September 30, 1998. A copy of the opinion is included in the appendix at Appendix B.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 10, 1999. The petitioner filed a petition for rehearing en banc with the United States Court of Appeals which the United States Court of Appeals denied on September 9, 1999. This petition for writ of certiorari is filed within ninety days of the denial for petition for rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C.A. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution, specifically Section 5 of the Fourteenth Amendment, applies in this case. Also, there is an Eleventh Amendment immunity issue involved in this case.

There is also a state statute, Ark. Code Ann. §21-9-301, defining immunity of the state

offices and officials. However, immunity does not apply when there are intentional acts committed.

STATEMENT OF THE CASE

The petitioners were owners of a license from the Arkansas Department of Pollution Control and Ecology which gave them the recycling rights for several counties in Eastern Arkansas. Subsequent to their being licensed, the Arkansas Department of Pollution Control and Ecology, through federal grants, granted recycling rights to various counties within the district where the petitioners live. These grants were in direct competition with the recycling rights which had already been received by the petitioners. Through the testimony of various witnesses, the petitioners were set to prove that the Department of Pollution Control and Ecology intentionally issued these permits to drive the petitioners out of business in the recycling industry in Eastern Arkansas.

The petitioners filed suit in the Eastern District of Arkansas, Eastern Division, for damages as a result of their being forced out of business by the respondents. The petitioners were set to prove that federal money was used in getting these grants to counties to recycle which were in direct competition with the petitioners. The complaint filed by the petitioners alleged intentional acts by all respondents in forcing them out of business. Pursuant to the statutes stated above, state officers and employees are not immune from suit if they do acts intentionally.

The petitioners respectfully request the Court to grant the petition for writ of certiorari because of various cases being in conflict within the Eighth Circuit and other judicial circuits. The petitioners respectfully submit that the respondents are subject to being sued in federal court and that there is no immunity for them to hide behind.

The district court granted a motion to dismiss with a memorandum opinion and order dated September 30, 1998. The petitioners timely filed a notice of appeal with the district court, and the case was appealed to the United States Court of Appeals for the Eighth Circuit. On August 10, 1999, the United States Court of Appeals for the Eighth Circuit upheld the ruling of the district court in granting the motion to dismiss. Neither the district court nor the Court of Appeals faced the issue of whether a state could be sued if the acts of its employees were done intentionally. Both courts sidestepped this issue in deciding this case.

The petitioners filed a petition for rehearing en banc with the Eighth Circuit Court of Appeals on August 18, 1999. On September 9, 1999, the Eighth Circuit Court of Appeals denied the petition for rehearing en banc as well as the petition for rehearing by the panel. The instant appeal is filed within ninety days from the September 9 denial.

ARGUMENT FOR GRANTING WRIT

The primary argument for granting the writ is that the state has created an abrogation of immunity by having a statute which does not apply to intentional acts of employees. The unpublished decision of the Court of Appeals deviates from the statutes set out specifically by the State of Arkansas. In the cases of *Alsbrook v. City of Maumelle,* 156 F.3d 825 (8th Cir. 1998), and *Bradley v. Arkansas Department of Education,* 189 F.3d 745 (8th Cir. 1999), there are actions that are allowed where states can be sued directly. The Eleventh Amendment issue of immunity does not apply. Also, *see, Little Rock School District v. Mauney,* 183 F.3d 816 (8th Cir. 1999), and *Fuller v. Rayborn,* 161 F.3d 516 (8th Cir. 1998). These cases clearly show a conflict of states concerning the issue of states being sued. There needs to be judicial guidance from this Court in this area. Other circuits allow suits against states, and some definite reasoning should be cited by this Court for future application.

ARGUMENT

THE PETITIONERS ALLEGED IN THEIR COMPLAINT A CAUSE OF ACTION AGAINST THE STATE BASED UPON ARK. CODE ANN. §21-9-301, WHICH STATES OFFICIALS AND AGENCIES ARE NOT IMMUNE IF THEIR ACTIONS ARE DONE INTENTIONALLY AGAINST A CITIZEN OF THE STATE

The cases are clear in the Eighth Circuit that a state can be sued in federal court. In the case of *Bradley v. Arkansas Department of Education,* 189 F.3d 745 (8th Cir. 1999), the court stated that if federal funds are received by a state department, it waives its Eleventh Amendment immunity privileges. In the case of *Little Rock School District v. Mauney,* 183 F.3d 816 (8th Cir. 1999), the court stated that a statute must contain an unequivocal expression of Congress' intent to abrogate the states' Eleventh Amendment immunity. Also, this Court stated a statute must have an appropriate exercise of Congress' power under Section 5 of the Fourteenth Amendment. The state can waive its Eleventh Amendment immunity with respect to federal grants by voluntarily participating in a federal spending program.

This issue was faced directly in *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board,* 119 S.Ct. 219 (1999). The petitioners would urge this Court that the state's passing a statute which prohibits immunity from intentional acts would act as an abrogation of immunity. Also, if the case had proceeded further, the petitioners were set to prove

that the Arkansas Department of Pollution Control and Ecology received federal funds in granting the applications to East Arkansas Planning and Development District and East Arkansas Regional Solid Waste Management District, which would directly set up in competition to the petitioners. The petitioners were further set to prove that statements were made by the officials of Arkansas Department of Pollution Control and Ecology that they were trying to get rid of "mom-and-pop" operations such as the one held by the petitioners.

Also, case law shows that A.C.A. §21-9-301 does not apply to intentional acts. *See, Allamond v. Benton County,* 145 B.R. 608 (W.D. Ark. 1982).

Also, in the case of *Fuller v. Rayburn,* 161 F.3d 516 (8th Cir. 1998), the court found that Title VII permits recovery of damages for intentional discrimination, such as the allegations in this case against all of the respondents. They allege that there were intentional actions by the respondents to force them out of business. Therefore, it is logical that intentional acts to discriminate against the petitioners under 42 U.S.C.A. 1983 would allow receiving damages for intentional discrimination.

The district court and the Eighth Circuit Court of Appeals intentionally sidestepped the issue of intentional actions by the employees of the state when dismissing this action under Section 1983. There was a cause of action stated by the petitioners, and the writ of certiorari should be granted.

CONCLUSION

The Court of Appeals decision in this case is inconsistent with the interpretation of other cases in the Eighth Circuit, along with other circuits of the United States. The Eleventh Amendment issue of immunity does not prevent the State of Arkansas from being sued in federal court for intentional acts. The statutes specifically set this out. Furthermore, acceptance of federal funds for these grants which were setting up competition in direct conflict with the petitioners amounted to a waiver of the Eleventh Amendment immunity issue.

The petition for writ of certiorari should be granted. Otherwise, this Court will allow actions to be dismissed which should be prosecuted. Where the actions of the state are deemed to be subject to lawsuit, there should be some action to enforce this.

Respectfully submitted,
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APPENDIX A

Eighth Circuit Opinion, 8/10/99

United States Court of Appeals
For the Eighth Circuit

No. 98-3931

B. J. Griffith; Gordon Griffith;)
Delta Waste Recovery, Inc.,)
Appellants)
v.)
Arkansas Department of Pollution)
Control and Ecology; East Arkansas)
Planning and Development District;)
East Arkansas Regional Solid Waste)
Management District,)
Appellees.)

Appeal from the United States District Court
For the Eastern District of Arkansas
[UNPUBLISHED]

Submitted: May 14, 1999
Filed: August 10, 1999

Before WOLLMAN, Chief Judge, BEAM, and MURPHY, Circuit Judges.

PER CURIAM.

B. J. Griffith, Gordon Griffith, and Delta Waste Recovery, Inc. appeal from the judgment of

the district court[1] granting the appellees' separate motions to dismiss. Having reviewed the parties' briefs, we conclude that the court correctly analyzed the relevant legal principles as they apply to the facts of the case. Because an extended opinion would have no precedential value, we affirm without further discussion. *See* 8th Cir. R. 47B

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[1] The Honorable Susan Webber Wright, Chief Judge, United States District Court for the Eastern District of Arkansas.

APPENDIX B

District Court Memorandum and Order on Motion to Dismiss, 9/30/98

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

B. J. Griffith, Gordon Griffith, and Delta Waste Recovery, Inc., Plaintiffs,	)	
vs.	)	No. H-C-98-074
Arkansas Department of Pollution Control & Ecology; East Arkansas Planning and Development District; and East Arkansas Regional Solid Waste Management District, Defendants.	)	

MEMORANDUM OPINION AND ORDER

On June 1, 1998, plaintiffs filed this action pursuant to 42 U.S.C. §1983, alleging violation of their constitutional rights by defendants. Plaintiffs also assert state law claims and seek damages, attorney's fees, and costs. Now before the Court are separate motions to dismiss filed by defendants to which plaintiffs have responded. For the reasons stated below, the Court grants the motion to dismiss.

I.

Plaintiffs B. J. Griffith and Gordon Griffith incorporated Plaintiff Delta Waste Recovery, Inc. and borrowed money from Separate Defendant East Arkansas Planning and Development District ("EAPDD"), the Arkansas Industrial Development Commission ("AIDC"), and the Arkansas Development Finance Authority ("ADFA") to begin operation of a solid waste facility in Madison, Arkansas. Plaintiffs had obtained a permit from Separate Defendant Arkansas Department of Pollution Control and Ecology ("ADPCE") and were the only private permittee in the State of Arkansas. Plaintiffs state that after they began operation of Delta Waste Recovery, Inc. in April 1992, the ADPCE, EAPDD and Separate Defendant East Arkansas Regional Solid Waste Management District ("EARSWMD") began awarding grant money to governmental agencies in the solid waste district, which included the counties of Poinsett, Cross, Crittenden, Lee, St. Francis, and Phillips counties of eastern Arkansas.

In Count I, Plaintiffs allege that by providing grants and facilitating the purchase of equipment by the cities of West Memphis, West Helena, and Marked Tree, defendants willfully and deliberately failed to comply with the requirements of state law, thereby depriving plaintiffs of the exercise of their permit to dispose of solid waste and to recycle. As a result, plaintiffs suffered monetary losses, and in June 1996, the EAPDD began a foreclosure action. Plaintiffs state that because defendant EAPDD held a third mortgage, after those of the AIDC and ADFA, the AIDC and ADFA were forced to foreclose on their liens.

Plaintiffs allege defendants' actions constitute an unlawful taking of property in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

In Count II, plaintiffs allege they had a contract expectancy for the processing of solid waste and recyclables from governmental entities within the area covered by EARSWMD and that defendants, by aiding and assisting other governmental entities to go into direct competition with plaintiffs, breached their contract and intentionally interfered with their contract.

In considering a motion to dismiss, the complaint should be liberally construed in the light most favorable to the plaintiff. *Fusco v. Xerox Corp.* 676 F.2d 332, 334 (8th Cir. 1982). All inferences which may be drawn from the facts alleged should be drawn in favor of the plaintiff, *Park View Heights Corp. v. City of Black Jack,* 467 F.2d 1208, 1212 n.3 (8th Cir. 1972), and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts thereunder which would entitle him or her to relief. *Price v. Moody,* 677 F.2d 676, 677 (8th Cir. 1982). Fed.R.Civ.P. Rule 12(b)(6) is not a device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint. *ACLU Foundation of Southern California v. Barr,* 952 F.2d 457, 467 (D.C. Cir. 1991) (citations omitted). The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims, irrespective of a judge's belief of a complaint's factual allegations or a judge's belief that the

plaintiff cannot prove what the complaint asserts. *Id.* (citations omitted).

III.

The Arkansas Department of Pollution Control and Ecology moves for dismissal on the following grounds: (1) state statutes cited do not confer a privilege on plaintiffs; (2) it is immune from suit; (3) it is not the proper party; (4) plaintiffs failed to exhaust their administrative remedies; (5) the claims are barred by the statute of limitations; (6) failure to state a claim; and (7) state is not a person for purposes of a §1983 action.

The East Arkansas Planning and Development District and the East Arkansas Regional Solid Waste Management District move for dismissal of the complaint as well. They contend (1) plaintiffs have failed to state a claim upon which relief can be granted; (2) the matters raised by plaintiffs constitute a compulsory counterclaim which should have been raised against EAPDD in the foreclosure action; and (3) plaintiffs do not have standing to assert an action that exists on behalf of the corporate plaintiff only.

IV.

The Court first addresses plaintiffs' claim pursuant to 42 U.S.C.A. §1983 that defendants violated their due process rights.

A.

A state is not a "person" within the meaning of 42 U.S.C.A. §1983 and thus may not be sued under that statute. *Will v. Michigan Dep't of State Police,* 491 U.S. 58 (1989). Moreover, the Eleventh Amendment to the United States Constitution bars section 1983 suits against state governments in federal courts. *Quern v. Jordan,* 440 U.S. 332 (1979). An agency or department of state government, such as ADPCE, is undisputably an entity of the state for purposes of the Eleventh Amendment.[1] *See, e.g., Will,* 491 U.S. at 70. "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. This bar exists whether the relief sought is legal or equitable." *Papsan v. Allain,* 478 U.S. 265, 276 (1986). Accordingly, Plaintiffs' §1983 claims against the ADPCE are prohibited by the Eleventh Amendment.

B.

Plaintiffs allege defendants EAPDD and EARSWMD deprived them of their property without due process of law in violation of the Fourteenth Amendment. "Section 1983 relief is predicated on the denial of a right or interest protected by the Constitution. . . . Analysis of either a procedural or substantive due process claim must begin with an examination of the interest allegedly violated.

---

[1] Plaintiffs do not contest in their response to the ADPCE's motion to dismiss that the ADPCE is a governmental entity of the State and describes it as an agency of the State of Arkansas in their complaint.

Protected property interests are created by state law, but federal constitutional law determines whether the interest created by state law rises to the level of a protected property interest." *Dover Elevator Co. v. Arkansas State University,* 64 F.3d 442, 445-46 (8th Cir. 1995) (internal quotations and citations omitted). "A protected property interest, which is a question of state law, is 'a legitimate claim to entitlement . . . as opposed to a mere subjective expectancy.'" *Bituminous Materials, Inc. v. Rice County,* 126 F.3d 1068, 1070 (8th Cir. 1997) (internal quotation and citations omitted).

> State law can create a property interest in a number of different ways. State law can explicitly create a property right. . . . A state may also 'create a constitutionally protected interest by establishing statutory or regulatory measures that impose substantive limitations on the exercise of official discretion.' Finally, a state may create a protected property interest by 'understandings between the state and the other party.'

Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716, 719 (8th Cir. 1995). Here, as in *Movers Warehouse,* plaintiffs' property interest must be derived from "substantive limitations on the exercise of official discretion."

Plaintiffs assert defendants failed to comply with Ark. Code Ann. §§8-6-609(c)(2) and 610 and thus allowed entities to unlawfully compete with them. Section 8-609 sets up a grant program of

assistance for districts and local government to develop solid waste management plans, programs, and facilities that integrate recycling as a part of the solid waste management system. It further states the legislative preference for regional or multicounty solid waste management palnning.

Section 8-6-609(c)(2) provides:

> Grant assistance shall not be provided for the purpose of purchasing mechanical processing equipment or facilities if existing mechanical processing equipment or facilities adequately serve the relevant area, unless the department determines that the equipment or facility is an indispensable component of an otherwise eligible grant project and would more efficiently serve the relevant area.

Plaintiffs assert that if defendants had evaluated the existing facility of plaintiffs before grants were awarded to the cities of West Memphis, West Helena and Marked Tree, defendants would have determined that plaintiffs could have adequately served the solid waste management plan for the existing area. Specifically, plaintiffs allege a proper evaluation of their facility would have revealed that the equipment and facilities which were purchased with the grant monies were not indispensable components of an eligible grant program.

In *Bituminous Materials, Inc., supra,* a road paving contractor brought an action against the

county, alleging that the county violated its right to substantive due process when it placed restrictions on a permit issued to the contractor. The ordinance under which the permit was issued provides that such permit " '*may* be granted for the placement and operation of equipment which is incidental to the construction of public . . . roads where found to be essential to the function intended.' " 126 F.3d at 1070. The court held that the ordinance did not limit the county's discretion or deny or restrict a permit sufficiently to grant the contractor a property interest in the permit. "BMI's interest in the permitting process therefore 'amounts to nothing more than an abstract need or desire, which is not sufficient to establish a protected property interest.' " *Id.* (citations omitted).

Plaintiffs urge that Ark. Code Ann. 8-6-601 *et seq.*, confer upon them a right to be free from competition. While the statute provides that grant assistance "shall not be provided for the purpose of purchasing mechanical processing equipment or facilities if existing mechanical processing equipment or facilities adequately serve the relevant area," it goes on to state that if "the department determines that the equipment or facility is an indispensable component of an otherwise eligible grant project and would more efficiently serve the relevant area," it may provide such grant assistance. As defendants EAPDD and EARSWMD point out, the statute defines "department" as the Department of Pollution Control and Ecology. *See* Ark. Code Ann. §8-6-603(2). Thus, it does not appear that these defendants have authority to make the decisions about which plaintiffs complain.

The Court declines to recognize a constitutionally-protected property interest based upon the language of the statutes. The statutes do not place substantial limits on the defendants' discretion to award grants, assuming that these defendants had any decision-making authority. The statutes merely give the ADPCE authority to issue and set guidelines for issuing grants. Even assuming the allegations are true that defendants EAPDD and EARSWMD failed to comply with statutory requirements to evaluate existing facilities before grant money is approved, such allegations fail to state a claim upon which relief may be granted.

V.

Title 28 United States Code Section 1367(a) provides that "in any civil action on which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that . . . form part of the same case or controversy. . . ." The statute goes on to provide that a district court may decline to exercise supplemental jurisdiction in certain circumstances. *See* 28 U.S.C. §1367(c)(3) ("the district court has dismissed all claims over which it has original jurisdiction. . . ."). Because the Court dismisses plaintiffs' federal law claims, it declines to exercise supplemental jurisdiction over the state law claims. The Court, therefore, dismisses the state claims without prejudice.

law claims. The Court, therefore, dismisses the state claims without prejudice.

VI.

IT IS THEREFORE ORDERED that the motions to dismiss (docket entries 3 & 5) be and are hereby granted. Judgment will be entered accordingly.

DATED this 29th day of September 1998.

SUSAN WEBBER WRIGHT
United States District Court
Chief Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

B. J. Griffith, Gordon Griffith, and Delta Waste Recovery, Inc., Plaintiffs,	)	
vs.	)	No. H-C-98-074
Arkansas Department of Pollution Control & Ecology; East Arkansas Planning and Development District; and East Arkansas Regional Solid Waste Management District, Defendants.	)	

Judgment

Pursuant to the Memorandum Opinion and Order entered in this matter on this date, IT IS CONSIDERED ORDERED AND ADJUDGED that this case is hereby dismissed. The relief sought on the claims pursuant to 42 U.S.C. §1983 is denied. The remaining state law claims are dismissed without prejudice.

DATED this 29th day of Sepember 1998.

SUSAN WEBBER WRIGHT
United States District Court
Chief Judge

APPENDIX C

Eighth Circuit Order Denying Petition for Rehearing En Banc and for Rehearing by Panel 9/9/99

United States Court of Appeals
for the Eighth Circuit

No. 98-3931EAH

B. J. Griffith, Gordon Griffith, Delta Waste Recovery, Inc.,
Appellant,

v.

Arkansas Department of Pollution Control and Ecology, East Arkansas Planning and Development District, East Arkansas Regional Solid Waste Management District,
Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)

September 9, 1999

Order Entered at the Direction of the Court:
MICHAEL E. GANS
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX D
A.C.A. §21-9-301

It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability and from suit for damages, except to the extent that they may be covered by liability insurance. No tort action shall lie against such political subdivision because of the acts of its agencies and employees.

(2)

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IN THE SUPREME COURT OF THE UNITED STATES
October 1999 Term

B.J. GRIFFITH, GORDON GRIFFITH and
DELTA WASTE RECOVERY, INC.
Petitioners

v.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL
AND ECOLOGY, EAST ARKANSAS PLANNING AND
DEVELOPMENT DISTRICT and EAST ARKANSAS
REGIONAL SOLID WASTE MANAGEMENT DISTRICT
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May an action for money damages against a State agency be maintained in federal court.

PARTIES TO THE PROCEEDING

Petitioners

B.J. Griffith, Gordon Griffith and Delta Waste Recovery, Inc.

Respondents

Arkansas Department of Pollution Control and Ecology[1]; East Arkansas Planning and Development District; and East Arkansas Regional Solid Waste Management District[2].

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[1]Pursuant to Act 1219 of 1997 of the Arkansas General Assembly, the Arkansas Department of Pollution Control and Ecology had its name changed to the Arkansas Department of Environmental Quality. The style of this case reflects the agency's former name.

[2]The District Court dismissed Petitioners' claims against the East Arkansas Planning and Development District ("EAPDD") and the East Arkansas Regional Solid Waste Management District ("EARSWMD") for failure to state a claim. (Pet at App. B-5 - B-9). That dismissal was not based on the sovereign immunity of Arkansas or its officers. Petitioners present one question for review: the immunity of the State and its officers against suit in this case. That question does not concern EAPDD or EARSWMD, or touch the District Court's dismissal of all Petitioners' claims against those two entities for failure to state a claim.

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Article V, Section 20, Arkansas Constitution

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the U.S. Constitution and Article V, Section 20 of the Arkansas Constitution.

STATEMENT OF THE CASE

The Arkansas Department of Pollution Control and Ecology (ADPC&E), now known as the Arkansas Department of Environmental Quality, is a state agency charged with administering and enforcing the state's solid waste program. Under the provisions of the Solid Waste Management Act, A.C.A. § 8-6-201 et seq., a permit is required to construct or operate any solid waste processing or disposal facility. Delta Waste Recovery, Inc. obtained a permit from ADPC&E in 1991 to construct and operate a material recovery facility located in Madison, Arkansas. A solid waste permit authorizes a permittee to construct and operate a solid waste processing or disposal facility. The issuance of a state permit does not guarantee the permittee financial success, nor does a solid waste permit, or license, grant "recycling rights" as stated by Petitioners (Pet., p.2).

In 1989, the state legislature enacted the Solid Waste Management and Recycling Act, A.C.A. § 8-6-601 et seq., which creates a grant program to assist solid waste management districts and local governments with developing solid waste management plans, programs, and facilities that integrate recycling into their solid waste management systems. The grant program is intended to promote recycling as part of the development of regional solid waste management systems that will meet the solid waste needs of the state in an efficient, cost-effective, and environmentally sound manner. A.C.A. § 8-6-602. The grant program does not grant "recycling rights" as stated by Petitioners (Pet., p. 2).

Funding for the recycling grant program comes from solid waste disposal and collection fees collected from landfill permittees and solid waste transporters. The fees collected are deposited in the State Treasury to the credit of the Solid Waste Management and Recycling Fund. A.C.A. §§ 8-6-607 and 8-6-

609. The fees collected pursuant to the provisions of the Solid Waste Management and Recycling Act are the source of funding for the recycling grants, not federal money as stated by the Petitioners (Pet., p. 2). Fees collected are allocated among the regional solid waste management districts according to the provisions of A.C.A. § 8-6-609(b). Each regional solid waste management district is responsible for the grant application process and acceptance of grant applications from its district members. A.C.A. § 8-6-609(c)(5)(A).

Costs eligible for grant assistance include costs for solid waste management planning that integrates recycling, costs for public information and education programs that encourage waste reduction and stimulate demand for products produced from recycled materials, costs of waste transfer facilities that integrate recycling in their operations, costs of recycling equipment, and recycling program and market development costs. A.C.A. § 8-6-609(c)(1). The Solid Waste Management and Recycling Act authorizes ADPC&E to make a determination about whether grant money may be used for purchasing mechanical processing equipment or facilities. A.C.A. § 8-6-609(c)(2). ADPC&E does not issue permits as part of the grant program as suggested by Petitioners (Pet., p. 2). Any facility requiring a solid waste permit, must obtain one from the Department for construction and operation regardless of the source of funding. The Department has not issued permits or awarded grants to intentionally drive Petitioners out of business as stated by Petitioners (Pet., p. 2).

In 1998, Petitioners filed suit in federal court naming as a party the Arkansas Department of Pollution Control and Ecology, a state agency, and seeking money damages. Petitioners' complaint failed to identify any intentional acts of individual state employees. ADPC&E filed a motion to dismiss which was granted by the District Court. The District Court held:

> A state is not a "person" within the meaning of 42 U.S.C.A. § 1983 and thus may not be sued under that statute. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Moreover, the Eleventh Amendment to the United States Constitution bars section 1983 suits against state governments in federal courts. *Quern v. Jordan*, 440 U.S. 332 (1979). An agency or department of state government, such as ADPCE, is undisputably an entity of the state for purposes of the Eleventh Amendment. *See, e.g., Will*, 491 U.S. at 70. "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as. the defendant is proscribed by the Eleventh Amendment. The bar exists whether the relief sought is legal or equitable." *Papsan* [sic]*v. Allain*, 478 U.S. 265, 276 (1986). Accordingly, Plaintiffs' § 1983 claims against the ADPCE are prohibited by the Eleventh Amendment.

[footnote omitted].

The Eighth Circuit concluded that the lower court correctly analyzed the relevant legal principles as they applied to the facts of the case, determined that there was no precedential value in providing an extended opinion, and affirmed the lower court without further discussion. The Petitioners filed a petition for rehearing en banc with the Eighth Circuit which was denied.

SUMMARY OF ARGUMENT FOR DENYING WRIT

The United States District Court for the Eastern District of Arkansas properly dismissed the federal law claims against the State of Arkansas, Department of Pollution Control and Ecology, and that decision was properly affirmed. The State is immune from suit for money damages in federal court under the Eleventh Amendment and 42 U.S.C. § 1983. This Court has previously decided these issues, and there is no dispute or conflict to be resolved which would be served by this Court's granting the Petition for Writ of Certiorari in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE LOWER COURTS CORRECTLY HELD THE STATE IS NOT A "PERSON" FOR THE PURPOSE OF 42 U.S.C. § 1983

The federal law claims against the State of Arkansas, Department of Pollution Control and Ecology, were properly dismissed in this case. The issues presented to the lower courts involve questions of Eleventh Amendment sovereign immunity which have previously been decided by this Court. There is no issue of first impression, nor any dispute or conflict which would be served by the Court's granting a Writ of Certiorari in this case.

The United States District Court, Eastern District of Arkansas, properly dismissed Petitioners' federal law claims against the State of Arkansas, pursuant to 42 U.S.C. § 1983 and Eleventh Amendment sovereign immunity. The decision was properly affirmed by the Eight Circuit Court of Appeals. Neither court addressed Petitioners' state law claims because the case was dismissed on federal grounds. The weight of legal jurisprudence is behind the State in this case, and the Court need not revisit the decisions of the lower court.

This Court has held that a State is not a "person" within the meaning of 42 U.S.C. § 1983, and thus may not be sued under that federal statute. *Will v. Michigan Dept. Of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The Court's decision has been followed by various federal courts, and the decisions of the Eighth Circuit are not in conflict with this Court's ruling. *See Murphy v. State of Ark.*, 127 F.3d 750 (8th Cir. 1997); *Burk v. Beene*, 948 F.2d 489 (8th Cir. 1991).

The District Court's decision, which was affirmed by the Eighth Circuit Court of Appeals, properly relied upon this Court's holding in *Will v. Michigan Dept. Of State Police., supra.* The District Court held that, "[a]n agency or department of state government, such as ADPCE, is undisputably an entity of the state for purposes of the Eleventh Amendment." (*See* Pet. App. B, p. B-5).

2. THE ELEVENTH AMENDMENT BARS SUIT AGAINST UNCONSENTING STATES

The Eleventh Amendment to the United States Constitution removed the jurisdiction of the federal courts over suits filed against the states by citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). This Court has stated, "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Will v. Michigan Dept. of State Police*, 491 U.S. at 70; *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct., 2932, 92 L.Ed.2d 209 (1986) (*quoting Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984)). The District Court in this case relied upon this Court's precedents and specifically quoted the rule from *Will* when rendering its decision (*See* Pet. App. B, p. B-5).

The Petitioners seek to impose liability upon the public funds of the State Treasury by bringing this suit in federal court. Such suits by private parties are precluded by the Eleventh Amendment if the State has not consented to suit. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). This same rule has been invoked in decisions of the Eighth Circuit. *Hadley v. North Ark. Community Tech. Coll.*, 76 F.3d 1437 (8th Cir. 1996), *reh'g and suggestion for reh'g denied, cert. den.* 519 U.S. 1148, 117 S.Ct. 1080, 137 L.Ed.2d 215 (1997); *Dover Elevator Co. v. Arkansas State University*, 64 F.3d 442, (8th Cir. 1995).

3. THE STATE OF ARKANSAS HAS NOT CONSENTED TO BEING SUED IN FEDERAL COURT AND THE DECISION IN THIS CASE IS NOT INCONSISTENT WITH OTHER CASES IN THE EIGHTH CIRCUIT

Absent a state's consent to being sued or a specific abrogation of sovereign immunity, the Eleventh Amendment acts as an absolute bar to suits against a state in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). For purposes of this suit and all others, ADPC&E, an agency of the State, is the State. *Edelman v. Jordan, supra*. The State of Arkansas has not waived its immunity (see Ark. Const., art. V § 20) and Congress has not acted to abrogate that immunity in this matter. The Petitioners brought suit pursuant to a federal civil rights statute, 42 U.S.C. §1983. It is now clear to all that Congress, in enacting Section 1983, did not abrogate sovereign immunity. See *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

Petitioners point out the test articulated in *Seminole Tribe* in their brief (Pet., p. 5). However, Petitioners claim that the State has consented to being sued by participating in what is called "a federal spending program" (Pet., p. 5). Petitioners also argue that a conflict exists in the Eighth Circuit on this issue which would be served by this Court's granting of Certiorari (Pet., p. 4). Petitioners' argument that suit should be maintained against the State fails on both counts. First, The State has not waived its sovereign immunity. The Arkansas Department of Pollution Control and Ecology received no federal funds for the grants at issue in the instant case.[3]

[3]The State also points out that even if federal funds were involved in the grants, this Court held in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247, 105 S. Ct. 3142, 87 L.Ed.2nd 171 (1985) that "the mere receipt of federal funds does not establish that a State has consented to suit in federal court."

Secondly, decisions of the Eighth Circuit Court of Appeals which are cited by Petitioners are not in conflict with other decisions of that court, and are distinguishable from the instant case because the cases cited involve a statute in which a clear declaration of waiver or congressional abrogation of the State's sovereign immunity is present or where federal funding is involved.

For example, in *Bradley v. Arkansas Dept. of Educ.*, 189 F.3d 745 (8th Cir. 1999), and *Little Rock School Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999), two cases cited by Petitioners (Pet., p. 5), both cases involved the Individuals With Disabilities Act ("IDEA"). Section 1403 of the IDEA contains what the Eighth Circuit Court of Appeals referred to as, "an unambiguous waiver of the States' Eleventh Amendment Immunity." The Eighth Circuit Court of Appeals held that by participating in the federal spending program created by the IDEA statute, the State waived its sovereign immunity with respect to that statute, which contains a clear and unambiguous waiver of immunity. *Bradley v. Ark. Dept. Of Educ.*, 189 F.3d at 753. No such clear and unambiguous waiver of immunity exists in the instant case.

Petitioners also cite *College Sav. v. Florida Prepaid Postsecondary*, ___ U.S. ___, 119 S.Ct. 2219 (1999), which is in fact analogous to the instant case. In that case, this Court held that federal courts have no jurisdiction to entertain a suit against a state because the Trademark Act of 1946 did not abrogate the State's sovereign immunity, nor did the State voluntarily waive its sovereign immunity. The Court restated its own rule that a State's waiver of its sovereign immunity must be unequivocal. The Court noted that a "clear declaration" by the State of its waiver is required in order to be certain that the State in fact consents to being sued. The sovereign immunity of the State of Arkansas has not been waived or abrogated in this case. Therefore, the State is not subject to suit in federal court.

A strict standard is applied to determine if a State has waived its Eleventh Amendment immunity. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 110 S.Ct. 1868, 109 L.Ed.2d 264 (1990); *Edelman v. Jordan, supra.* The Eighth Circuit Court of Appeals, relying upon this Court's holding in *Port Authority Trans-Hudson Corp.*, has held that, "[w]hile Eleventh Amendment immunity may be waived, such waiver must be unequivocally expressed." *Angela R. by Hesselbein v. Clinton*, 999 F.2d 320 (8th Cir. 1993). This Court has also held that Congressional abrogation of sovereign immunity must be exercised with "unmistakeable clarity". *Blatchford v. Native Village of Noatuk and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), *appeal after remand*, 38 F.3d 1505 (9th Cir. 1994). Neither a clear expression of waiver nor an unmistakably clear abrogation of immunity has occurred in this case.

Over two decades ago, the specific issue which has been raised by Petitioners was addressed by this Court. This Court held that Congress did not abrogate Eleventh Amendment immunity by enacting the federal civil rights statute, 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). The decision of the Court in *Quern, supra,* is often cited and holds true today. The decisions of the Eighth Circuit echo the Court's ruling in *Quern*. *See Williams v. State of Missouri*, 973 F.2d 599 (8th Cir. 1992); *Burk v. Beene, supra.* This Court need not revisit these issues.

4. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION.

The United States District Court for the Eastern District of Arkansas dismissed Petitioners' claims based upon federal law grounds. The lower courts did not address Petitioners' state law claims. Petitioners failed to identify any intentional acts of

individual state employees in their suit for money damages.

The District Court properly granted the State's Motion to Dismiss which was properly affirmed without comment by the Eighth Circuit Court of Appeals.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,
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APPENDIX

Article V, Section 20 of the Arkansas Constitution of 1874

Sec. 20. State not made defendant.

The State of Arkansas shall never be made defendant in any of her courts.